COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2015-SC-000465-D
(2014-CA-001050)

ALEX ARGOTTE, M.D. — APPELLANT

v. McCracken Circuit Court
2008-CI-01512

JACQULYN G. HARRINGTON — APPELLEE

REPLY BRIEF FOR APPELLANT, ALEX ARGOTTE

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CERTIFICATE OF SERVICE

I hereby certify that ten (10) originals of the foregoing have been served via Federal Express upon: **Susan Stokley Clary, Clerk of the Supreme Court of Kentucky**, State Capitol, Room 209, 700 Capital Avenue, Frankfort, Kentucky 40601; and that a true and correct copy of the foregoing has been served by regular mail upon: **Samuel Givens, Jr., Clerk of the Kentucky Court of Appeals**, 300 Democrat Drive, Frankfort, Kentucky, 40601-9229; and a true and correct copy of the foregoing has been served by regular U.S. mail upon: **Hon. Craig Z. Clymer,** Circuit Court Judge, Division II, McCracken Circuit Court, P.O. Box 1455, Paducah KY 42003; **Clifton A. Boswell, Esq.**, Clifton A. Boswell, PLC, 1402 East 4th Street, Owensboro KY 42303, and **Charles S. Wible, Esq.**, Charles S. Wible Law Offices P.S.C., 324 St. Ann Street, Owensboro KY 42302, *Attorneys for Appellee*; this 6th day of June, 2016. I further certify that the record on appeal was not withdrawn by Appellants.

James A. Sigler

ARGUMENT

The appellee, in her response, does not and cannot deny that she told the jury via her opening statement (1) that she had signed a written consent form identifying the risk of migration of the vena cava filter; and (2) that she had no expert testimony to support her claim. She judicially admitted these facts and does not dispute same today. If these facts would preclude her recovery as a matter of law, then the trial court properly entered a direct verdict following opening statements and before any evidence was otherwise introduced. This is the law according to *Samuels v. Spangler,* 441 S.W.2d 129 (Ky. 1969); *Lambert v. Franklin Real Estate Co.*, 37 S.W.3rd 770, 774 (Ky.App. 2000); and the other authorities cited in Appellant's Brief. Appellee has not distinguished these cases nor cited any authority to the contrary. Instead, she admits that the court may properly direct a verdict following a plaintiff's opening statement if counsel makes an admission that is fatal to her cause of action. Response at 7, citing *Riley v. Hornbuckle*, 366 S.W.2d 304 (Ky. 1963). Thus, the parties agree that the procedural timing of the directed verdict is not determinative if the absence of a viable claim has been proved.

Appellee argues, without supporting authority, that Dr. Argotte should have known to move for summary judgment when she suddenly dropped her expert from her trial witness list, less than a month before trial; and that the trial judge should have granted her untimely alternative motion for a continuance, which she never raised until a week after the directed verdict ended the trial. There is no authority for the proposition that a motion for summary judgment is prerequisite to a motion for directed verdict. There is no authority for the proposition that a trial judge abuses his discretion by

denying a motion to continue a trial that has already ended. These arguments are red herrings, and the Court of Appeals essentially ignored them. The truth is that the plaintiff/appellee took ownership of her substantive legal argument on trial day, eschewing such procedural arguments during her opening statement and during the extensive hearing that followed. As the trial court recounted in denying her post-trial motion, Plaintiff's counsel told first the jury and then the judge – after extensive questioning - that there would be no expert testimony and that she did not believe such was necessary. R. at 613-617. On trial day, even after being placed on notice of the impending directed verdict due to the lack of an expert, Plaintiff never asked to present an expert nor asked for a continuance to retain one. *See id.* Plaintiff's counsel even admitted to the trial court that she had anticipated that Dr. Argotte would move for a directed verdict at the close of Plaintiff's proof. *Id.* The disputed legal question at that juncture – i.e. whether the above two judicial admissions were fatal to Plaintiff's case - would have been no different at the close of Plaintiff's proof than at the summary judgment stage, or following opening statements. Plaintiff decided before trial, and has contended to this day, that she did not need an expert as a matter of law. The issue she created is substantive, not procedural.

Following trial, Plaintiff also attempted for the first time to recharacterize the dispute as purely factual rather than legal, arguing that: "The dispute in this case is not whether Dr. Argotte should have disclosed certain facts, but whether he actually did." *Id.* She repeats this argument in her Response Brief, but it is another red herring. Appellant cannot improve on Judge Clymer's reaction to it:

> Apparently the argument is that a lay jury can determine what the doctor told his patient and what he did not tell her and it would be obvious that he did not tell her enough. This reasoning is contrary to Kentucky law. To determine whether the facts establish that there was a valid informed consent, the jury must have information as to what constitutes a valid informed consent. A lay jury cannot speculate as to the appropriate standard. Plaintiff must establish the standard by expert proof. Only then, by comparing the information given by the doctor to the patient, can the jury compare and contrast to determine if the facts comply with the standard.

Id.

In truth, the dispute between the parties is predominately legal; not factual. The pertinent legal question is: how much proof of consent is necessary to trigger the expert requirement in a lack-of-informed-consent case? Ms. Harrington argues that proof of a signed consent form identifying the general nature of the complication (here, migration of a filter) is not enough to trigger the expert requirement. She contends there are cases when such a consent form has been signed, and yet it is still proper for laypersons, without considering expert testimony, to decide what information should have been conveyed on the signed consent form or along with the form. Thus, she contends there are cases when laypersons can properly decide how much information is enough to create properly informed consent. She further contends that the trial judge must decide at the close of all the evidence whether such a case has arrived.

The problem with this approach is illustrated perfectly in Ms. Harrington's Response Brief. Therein, she argues that Dr. Argotte should have informed her of more than just the risk of migration which was clearly indicated on the signed form she showed to the jury (or as she described the form's disclosures in her opening: " . . . a whole bunch

of bad things that can happen if this filter is put in – a lot of bad things.".) VR 3/17/14 1:58:36-1:59:08 p.m. Instead, she argues that Dr. Argotte should have also informed her of the risk of fracture of the filter, and also of the fact that the filter was retrievable. Response Brief at 11-12. Relying on her counsel for this theory (since her sole expert testified before she dropped him that Dr. Argotte did give adequately informed consent), she posits that a lay jury could have analyzed this subject matter – regarding migration, fracturability, and retrievability of a vena cava filter – and determined that the medical standard of care "obviously" required more information. Since she received "absolutely no information" regarding "the issues surrounding retrievability of the IVC filter," she contends that the threshold proof necessary to trigger the expert requirement was not met, even under the *Keel* test as interpreted by the trial court. *Id.*

This Court will decide whether its holding in *Keel v. St. Elizabeth Med. Ctr.*, 842 S.W.2d 860 (Ky. 1992) extends so far, and what standard the Court may now wish to impose. Ms. Harrington quarrels with the trial court's "narrow" interpretation of *Keel*, as relieving the expert testimony requirement only when the defendant physician has given absolutely no information to the patient. But this distinction came from this Court, which chose to italicize it in noting that no expert was necessary because the defendant had given the patient "*no information whatsoever*" and that the defendant's "utter silence" as to the risks amounted to assurance that there were none. *See id.* at 862.

Ms. Harrington's interpretation, by contrast, is unreasonable and impractical, and would threaten the policy concerns which led courts nationwide to impose the expert requirement for all medical malpractice claims. There is nothing "obvious" to a

layperson about the layers of medical explanation expected of a reasonably competent physician in Dr. Argotte's position, when disclosing the risks of implanting a vena cava filter. Respectfully, such a determination goes beyond a judge's role as well, if totally unaided by experts. The courts look to the medical profession to provide the medical standard of care in such cases. With red herrings aside, Ms. Harrington's trail of logic leads us to a trial judge sitting at the close of the evidence, weighing medical proof to decide whether or not to step into a physician's role. *Keel* did not require any jurist, from the trial judge to this Court's Justices, to go that far.

For these reasons and those stated in its initial Brief, Appellee again asks the Court to reverse the Court of Appeal's decision and to dismiss this case with prejudice.

Respectfully submitted,
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